Supreme Court, U.S.
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Case No. 10-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 2010

MICHAEL W. RYAN,

Petitioner,

v

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should the Court act to resolve a split among the Circuits when the First, Second, Fifth, Seventh, and sometimes Eighth Circuits hold that *Cuyler v Sulivan*, 446 U.S. 335 (1980), applies to attorney-conflict cases irrespective of multiple representation, while the Fourth, Sixth, Eleventh, and sometimes Ninth Circuits restrict the holding to multiple representation instances of attorney conflict?

2. Should this Court follow the dictates of *Miller-El v Cockrell*, and 28 U.S.C. § 2253 and certify the issues presented below for appellate review?

3. When prosecutors knowingly suborn perjury and the false testimony is not corrected by the court and/or the prosecutor and the perjury involves the materiality of guilt or innocence, ought the lower courts to ignore it and/or excuse it because appellate counsel didn't argue it on direct appeal when it is brought under ineffective assistance of appellate counsel?

TABLE OF CONTENTS

Table of Contents.....ii

Table of Cases and Authorities.....ii

Citation of Reports.....1

Basis for Jurisdiction.....1

Constitutional and Statutory Provisions.....2

Statement of the Case.....4

Why the Writ Should Issue (Argument).....10

Issues Petitioner seeks to be Certified.....26

Appendix

Order Denying COA.....A

Order Denying § 2255 and COA (D.C.Mt.).B-1 to B-17

Order Denying Rehearing.....C

Letter from Counsel at trial.....D

TABLE OF CASES AND AUTHORITIES

Byrd, Jr. v Collins, 2000 U.S. App. LEXIS 6266 (2nd Cir. 2000).....27

California v Trombetta, 467 U.S. 479 (1984).....27

Chambers v Mississippi, 410 U.S. 284 (1973)...22, 27

Crane v Kentucky, 476 U.S. 683, 690 (1986).....22, 28

Cuyler v Sullivan, 446 U.S. 335 (1980).....Passim

Dean v Oklahoma Dept. of Corrections, 222 Fed. Appx. 12

Deiterman v State of Kansas, 291 Fed. Appx. 157 (10th Cir. 2008).....12

Earp v Ornoski, 451 F.3d 1158, 1184-1185 (9th Cir. 2005).....13

Edwards v Arizona, 451 U.S. 477, 482 (1982)...14, 21

Hall v United States, 371 F.3d 969 (7th Cir. 2004)..... .....11, 26

Holloway v Arkansas, 435 U.S. 475, 490 (1978).....21

Massaro v United States, 538 U.S. 500, 509 (2003).... 18

May v Henderson, 13 F.3d 528, 533 (2nd Cir. 1994).28

Mickens v Taylor, 535 U.S. 162 (2002).....14

Miller-El v Cockrell, 537 U.S. 322, 327 (2003)...18, 20

Moreno-Morales v United States, 334 F.3d 140, 148 (1st Cir. 2003).....27

Schwab v Crosby, 451 F.3d 1308, 1327 (11th Cir. 2006).....12

Slack v McDaniel, 529 U.S. 473, 484 (2000).....18

Stewart v Wolfenbagger, 468 F.3d 338, 351 (6th Cir. 2006).....12

Strickland v Washington, 466 U.S. 668, 688, 694 (1984).....Passim

Tuernos v Greiner, 343 F.3d 587, 593-594 (2nd Cir. 2003).....10

United States v Bagley, 473 U.S. 667, 680 (1985)..... .....24, 27

United States v Culverhouse, 507 F.3d 888, 892 (5th Cir. 2007).....26

United States v Infante, 404 F.3d 376, 393 (5th Cir. 2005).....11, 26

United States v Nicholson, 475 F.3d 241, 249 (4th Cir. 2007).....12

United States v Poe, III, 428 F.3d 1119, 1124 (8th Cir. 2005).....13

Winfield v Roper, 460 F.3d 1026, 1039 (8th Cir. 2006). 14

Yeboah-Sefah v Ficco, 556 F.3d 53, 73 (1st Cir.2009). 10

Constitutional Authority:

Fifth Amendment.....2, 13, 21

Sixth Amendment.....Passim

Fourteenth Amendment.....2, 23, 25

Statutory Authority:

18 U.S.C. § 1341.....23

18 U.S.C. § 1343.....23

28 U.S.C. § 2253(c)(2).....20, 25

28 U.S.C. § 2255.....Passim

CITATIONS OF REPORTS

The Order denying a Certificate of appealability by the Ninth Circuit was made on August 31, 2010, and is attached as Appendix Page "A-1" hereto.

The Order denying Petitioner's § 2255 and denying a Certificate of appealability was entered on February 5, 2010, and is attached as Appendix Pages "B-1" through "B-17" hereto.

The Order denying a Petition for Rehearing was entered on September 27, 2010, and is appended hereto as Appendix Page "C-1"

BASIS FOR JURISDICTION

The date the Ninth Circuit's Order denying the Certificate of Appealability was entered on August 31, 2010. The Ninth Circuit had jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253.

The district court had jurisdiction pursuant to 28 U.S.C. § 2255. Its decision was filed on February 5, 2010. The court also denied a Certificate of Appealability the same date.

The Ninth Circuit denied Petitioner's Petition for Rehearing on September 27, 2010.

This Court has jurisdiction pursuant to 28 U.S.C. §§ 1254 and 2253. This Petition is filed well within the 90-day limitation and pursuant to Supreme Court Rule 12(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Fifth Amendment: No person shall...be deprived of life, liberty, or property without due process of law.

Sixth Amendment: In all criminal prosecutions, the accused shall have the right...to have the Assistance of Counsel for his defense.

Fourteenth Amendment: Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside....[All citizens shall enjoy] the equal protection of the laws.

28 U.S.C. § 2253: (a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held....(c)(1) Unless a circuit justice or judge issues a certificate of appealability, and appeal may not be taken from—... (B) the final order in a proceeding under section 2255. (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

28 U.S.C.§2255(a)-(b): (a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of

the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

(b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

STATEMENT OF THE CASE

In order to grasp the import of resolving the conflict which exists among the circuits, Petitioner presents the facts underlying his conviction, which prove that he is actually and legally innocent and he ought never have gone to trial.

Petitioner owned and operated several Thrifty Car Rental franchises in Montana, Idaho and Wyoming. After the business was firmly established and profitable, Petitioner left the day-to-day operations to his wife, Dolly Ryan, and later hired a man by the name of Jeffrey Loney to handle the maintenance, insurance, and compliance aspects of the business.

Loney approached Petitioner during one of his infrequent meetings at their headquarters in Billings, Montana—by that time Petitioner was more involved in his Quarter Horse business than in the Auto Rental business—and introduced him to a man by the name of Kevin Massick, suggesting that it would ease their burdens if they would contract with Massick and his glass company, Fas-Break Auto Glass, to care for all the insurance claims, replace the windows damaged by customers and care for that aspect of the business. Petitioner said hello and said that he had no objection, as long as the windows were replaced according to Chrysler's standards and that they caused no problems with customers.

Massick began handling replacements and Loney

was the contact through whom they worked. Part of the agreement was that if there was a deductible on a customer's insurance for glass damage, Loney would contact the customer and advise him/her to pay that amount. This usually was accomplished by the customer's instructing them to just charge it to their credit card.

Chrysler had a zero-tolerance policy as to window damage. When cars were returned at the end of the lease from franchise-holders, if there was any window damage, it had to be repaired or they would charge the franchise-holder for replacement.

Petitioner always insisted that his employees have a customer sign a form showing any existing windshield damage or that there was none and agree to pay for any damage which occurred during their rental. They could take a waiver of any liability for a charge of $4.95, in which case, Petitioner's business would cover the costs of replacement.

Unbeknown to Petitioner at the time was the fact that Loney and Massick would bill the customer's insurance company for the full retail price of the windshield as set by "NAGS," and then when Fas-Break received the money from the insurance company, they would split the profit over costs. Massick would credit $50 on each windshield repair to help cover the costs of windshields Petitioner had to pay for when customers opted for the waiver.

The Government became involved when some

customers complained about the costs being excessive. They sent several FBI SAs to rent cars, purposely damaged the windshields and then paid for the costs of repair on their credit cards. This led to an investigation by the grand jury in which both Petitioner and his wife were named as persons of interest. Petitioners'/Thrifty's counsel, Mark D. Parker, primarily a civil attorney, represented them. Ultimately, the grand jury indicted Petitioner on conspiracy, mail and wire fraud, in violation of 18 U.S.C. §§ 371, 1341, and 1343. This occurred on May 22, 2006. Petitioner entered a plea of not guilty and Mr. Parker continued to represent him, involving also Petitioner's wife, Dolly Ryan so that she was not drawn into the case. Parker did not obtain a waiver of conflict from either party and Petitioner did not know the extent of Parker's efforts to protect Dolly Ryan, which continued throughout the trial.

The trial began on December 4, 2006, and on December 11, the petit jury convicted Petitioner on all charges. On August 15, 2007, Petitioner was sentenced to 71 months in prison with three years of supervised release to follow.

Due to Parker's concern that one of 13 witnesses who were prepared to testify might implicate Dolly Ryan, Parker decided without the approval of Petitioner ahead of time to rest at the end of the Government's case-in-chief. Petitioner learned only later that the reason Parker rested without presenting a defense was for that reason. In Petitioner's § 2255, prepared by Attorney Robert

Levitt in Denver, he stated that in his conversation with Parker, Parker admitted that he was "ineffective in this case as a result of his divided loyalties." Motion at 33)

Levitt raised the fact that on direct appeal, Parker and his co-counsel, James H. Goetz, raised the issue of the failure of the court to use the best evidence of what the Chrysler policy manual-contract provided as to glass replacement, and instead accepted the word of executives of Chrysler/Thrifty, that the policy had been modified so that they no longer required damage to windshields to be repaired. (Although they testified to this, when the alleged change was faxed to the prosecutor, it did not contain any change and they still required windshields damaged to be replaced; however, the prosecutor refused to correct the perjury of their witnesses and the court allowed the jury to accept as a correct statement of the matter what they executives alleged, constituting the subornation of perjury on the part of the prosecutor. The Ninth Circuit affirmed the conviction and sentence on June 19, 2008. (283 Fed. Appx. 478) Petition for certiorari to this Court was denied on November 9, 2008 (Case No. 08-508) and on November 5, 2009, Levitt filed the § 2255 motion.

For his perjurous testimony, Massick received only a 30-day sentence, and for his, Loney only got probation. If there was a conspiracy, that is, if it was illegal to charge retail for a replacement according to the Auto-Glass Insurance price allowance, then they

were the only ones guilty. To his knowledge and belief, Petitioner's wife, Dolly Ryan, was not involved in any illegal conduct, nor did she even have knowledge of Massick's and Loney's scheme, yet, unlike Petitioner, she had the hands-on management of the Thrifty Leasing outlets Petitioner owned. This appears to be the cause of the conflict in Parker's representation of both Petitioner and his wife.

Judge Cebull's recitement of what he believed the facts proven at trial were is blatantly false; these were not the findings of the jury, nor proven at trial. (See Appendix Pages "B-2" through "B-3" hereto.)

As to paragraph 1, there was no suggestion that Petitioner's employees were encouraged to find damage to the windshield, however slight." The fact is that employees had a duty to check for windshield damage because Chrysler's policy was to require replacement of any windshield damage.

As to paragraph 4, it is not true that "[m]ost of the windshields were not replaced." The fact is that at least half of the windshields damaged were replaced immediately, others as soon as possible when cars were not in service; some were always in service until the time to return to Chrysler.

As to paragraph 5, that statement is false. The "difference between actual cost of repair" was split between Massick and Loney, as some of the witnesses the defense ought to have called would have testified.

As to paragraph 6, that is a gross understatement. Some windshields did apparently cost Fas-Break only $300; however, Petitioner was unaware of the charge Fas-Break made to the customer's insurer. Many Windshields, Petitioner learned after this case was brought, costs far more than $300.

WHY THE WRIT SHOULD ISSUE (ARGUMENT)

A. There is a conflict among the circuits as to whether the lesser standard for adjudicating a Sixth Amendment conflict of interests claim is to be determined pursuant to *Cuyler v Sullivan*, 446 U.S. 335 (1980) or whether the stricter standard set under *Strickland v Washington*, 466 U.S. 668 (1984) is proper for cases where counsel only represented one defendant at trial.

The First Circuit, in *Yeboah-Sefah v Ficco*, 556 F.3d 53, 73 (1st Cir. 2009), said this:

> "[A]n ineffective assistance claim normally requires demonstrating 'prejudice,' *i.e.*, a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694. If however, 'the defendant demonstrates that counsel "actively represented conflicting interests" and that "an actual conflict of interest adversely affected his lawyer's performance,'" the *Strickland's* stricter standard of prejudice showing does not apply...(quoting *Cuyler*, 446 U.S. at 348)." (Counsel represented only defendant and the alleged conflict concerned a witness.)

In *Tuernos v Greiner*, 343 F.3d 587, 593-594 (2nd Cir. 2003), that court apparently agrees, saying:

> "[T]he [Supreme] Court also noted that

> *Sullivan* 'stressed the high probability of prejudice resulting from multiple concurrent representation' and 'that the language of *Sullivan* itself does not clearly establish, or even support,... expansive application of the 'adverse effect' standard beyond cases in which attorneys represent conflicting interests... This language in *Mickens*, however, is not dispositive of our analysis here. The scope of *Sullivan* [in *Mickens*] is dicta....
>
> "Although *Sullivan* dealt with a lawyer who owed duties to multiple defendants, it may well be unreasonable not to extend *Sullivan's* definition of an 'actual conflict' to a lawyer whose conflict was defined by representing divergent interests of a defendant and an important subpoenaed witness."

In *United States v Infante*, 404 F.3d 376, 393, n. 12 (5th Cir. 2005), that court noted that *Cuyler v Sullivan*, applied to both multiple and successive representation conflicts.

In *Hall v United States*, 371 F.3d 969 (7th Cir.2004), that court also applied *Cuyler v Sullivan* in the successive-representation case and remanded the case back to the district court for an evidentiary hearing, noting that "[p]roceeding under *Sullivan* places a 'lighter burden on the defendant than *Strickland* because demonstrating an 'adverse effect' is significantly easier than showing 'prejudice.'"

In *Dean v Oklahoma Dept. of Corrections*, 222 Fed. Appx. 790 and *Deiterman v State of Kansas*, 291 Fed. Appx. 153, Tenth Circuit, 2007 and 2008 respectively, that court appears to apply *Cuyler v Sullivan* in cases where there was no multiple concurrent representation.

On the other side of the ledger, there are a number of circuits which closely adhere to the principle that *Sullivan* governs attorney-conflict cases only when there is multiple-representation of defendants by an attorney during the same case. Among these are the following:

In *United States v Nicholson*, 475 F.3d 241, 249 (4th Cir. 2007), that court applied the test in *Sullivan* because the attorney's "representation of Nicholson and Butts created an actual conflict of interest...; Nicholson's interests, on the one hand, and Butt's interests, on the other, were in total opposition to each other during [the attorney's] simultaneous representation of them."

In *Stewart v Wolfenbagger*, 468 F.3d 338, 351 (6th Cir. 2006), that court refused to apply *Sullivan* because "this is not a case of multiple concurrent representation, so the *Strickland* standard applies."

In *Schwab v Crosby*, 451 F.3d 1308, 1327 (11th Cir.2006), that court crystalized the conflict raised by Petitioner:

> "[After discussing the Second Circuit's claim

> that the statements of this Court in *Mickens* were just dicta, that court said that they "disagree with the Second Circuit's statements in *Tueros* [and perhaps also the Fourth Circuit's] decision in *United States v Stitt*,...[they said that they] do agree with the Sixth Circuit's reasoning in *Smith v Hofbauer*,...[and] also...with the Ninth Circuit's similar reasoning and holding in *Earp v Ornoski*,...even though Ninth Circuit precedent has extended the *Sullivan* rule to other contexts."

Taking somewhat a middle ground, in addition to the Fifth Circuit's application of *Sullivan* to successive representation (*Infante*, 404 F.3d at footnote 12), both the Eighth and Ninth Circuit have straddled the fence, sometimes restricting application to attorney-conflict cases in multiple representation cases and in other cases to single or successive representation cases.

In *Earp v Ornoski*, 451 F.3d 1158, 1184-1185 (9th Cir. 2005), that court refused to apply *Sullivan* except in multiple-representation cases of conflicts, but then admitted that "our circuit's precedent has expanded the scope of *Sullivan* to apply to other contexts."

In *United States v Poe, III*, 428 F.3d 1119, 1124 (8th Cir. 2005) that court drew attention to the limited holding in *Sullivan*, because Poe was represented by a single attorney, but then went on to say that in order to "overcome the District Court's no-conflict finding, Poe must show that his counsel

'actively represented conflicting interests' that 'actually affected the adequacy of the representation.' *Cuyler v Sullivan*."

But, in a case the following year, *Winfield v Roper*, 460 F.3d 1026, 1039 (8th Cir.2006), they said that their "court has never determined whether the *Cuyler* rule extends to cases beyond those involving joint representation.

The long and short is that there is no uniform standard among the lower courts as to how to adjudicate attorney-conflict cases when there is either a single attorney or when there are issues which compromise the attorney's loyalty when counsel's conflict involves a prior client or a client in another case. This Court needs to clarify its holdings and set a proper standard for all the courts to follow.

In the instant case, Attorney Levitt raised the "actual conflict" issue in the § 2255 (Motion at 29-34, urging the court to recognize that although Petitioner's wife was not a defendant, trial and appeal co-counsel Parker had a duty to protect her interests and then if that conflict affected the attorney's conduct, "prejudice must be presumed." (Motion at 32, quoting from *Edwards v Arizona*, 451 U.S. 477, 482, which in turn quoted *Sullivan*.)

The district court addressed this serious ground on Appendix pages "B-12" through "B-14". Judge Cebull spoke of both *Mickens* and *Sullivan*, but then failed to apply their standards in assessing the facts

raised in the motion which showed that Attorney Parker's admission to § 2255 counsel Levitt that "he was ineffective in this case as a result of his divided loyalties." (Motion at 33)

The question begs an answer as to whether Judge Cebull was insistent on a showing of prejudice under the *Strickland* standard or simply unwilling to believe that the judge's good friend, Mark D. Parker would allow a conflict to alter his representation. (Judge Cebull stated unequivocally that he "is 100% certain that Parker knows what he is doing when he interviews witnesses in preparation for a criminal trial," (footnote 3 on Appendix page "B-6".)

As for the Ninth Circuit's denial of a COA, it is completely absent any reason whatsoever as to why it denied the COA. Neither the initial denial nor the denial of rehearing give a solitary reason.

Yet, under either the *Sullivan* standard or the *Strickland* standard, Petitioner was adversely affected and prejudiced by Parker's divided loyalties and the lower courts ought to have certified the issue for appellate review and a complete airing of the facts.

B. The divided loyalties of Parker caused him to rest without calling any witnesses out of a fear that one of the 13 witnesses might implicate Petitioner's wife, Dolly Ryan; thirteen witnesses were prepared to testify and their testimony would have shown a far more than "reasonable probability...of a different outcome."

Counsel who prepared Petitioner's § 2255 listed by name and as to their prospective testimony thirteen witnesses whom Petitioner had available and who would have testified directly to the Government's detriment. Their names and testimony they were prepared to offer both during trial and during an evidentiary hearing were set forth on pages 17 through 20 of the § 2255.

Ironically, due to Parker's concern that one or more of them might implicate Petitioner's wife, he not only did not call a single one, he failed to investigate Petitioner's claims that they had testimony which would have disproved the Government's allegations. Such a failure is a clear violation of *Strickland* in that a failure to investigate is only proper where there was a reasonable decision that the prospective testimony was unnecessary. (*Id.*, 466 U.S. at 688)

One of these witnesses was an expert Petitioner had paid to do a forensic examination of the costs Petitioner's business experienced in order to replace a windshield. This witness would have shown that Petitioner neither profited from the conspiracy perpetrated by Massick and Loney, nor received any of the funds split by them.

Several of the 13 witnesses ready to testify (some already in court when Parker rested without calling anyone) would have testified that the Government's witnesses lied when they said that Chrysler didn't accept autos to be returned with any damage, no

matter how minute, to the windshields. This was the heart and soul of the Government's case. Their witnesses' testimony was contrary to Chrysler's written policy, and they were persuaded to perjure themselves to state that Chrysler had changed that policy, when the current policy manual the Government had Chrysler fax in confirmed Petitioner's claims and showed Chrysler's witnesses lied under oath.

Yet, in spite of the very material facts at issue raised in the § 2255 Motion, Judge Cebull denied it without any evidentiary hearing to determine where the truth lay. Cases abound where jurists of reason not only would have found Judge Cebull's decision debatable, but outright contrary to law and due process. Yet, due to Judge Cebull's bias toward his good friend Mark D. Parker, he refused to allow anything to impugn his good character.

The divided loyalties of Attorney Parker altered and affected his decisions and resulted in his decision to prevent any testimony which he knew was likely to implicate Petitioner's wife and exonerate Petitioner. Of this there can be no reasonable dispute. Hence, whether examined from the position of *Strickland* or the less onerous standard in *Sullivan*, the conflict rendered Parker's representation of Petitioner ineffective and violative of the Sixth Amendment.

It is no mystery why Judge Cebull refused to grant an evidentiary hearing out of his close friend-

ship with Parker, but it is a mystery why the Ninth Cercuit refused to follow the dictates of this Court in *Miller-El v Cockrell*, 537 U.S. 322, 327 and 327(2003); also *Slack v Mc-Daniel*, 529 U.S. 473, 484(2000).

C. Appellate counsel provided ineffective assistance of counsel on direct appeal by failing to preserve the issue of the Government's suborning of perjury in the case of witnesses Schemm and Hambrecht.

Judge Cebull denied Petitioner's Post-Trial Motion regarding the Government's knowing failure to correct the perjured testimony of Chrysler's two witnesses subpoenaed by them. Counsel for the § 2255 Motion raised this as an example of ineffective assistance, but Judge Cebull said the question of suborned testimony was already denied by him. (Order at Appendix Page "B-14") In the direct appeal the perjury was not raised, only a "best-evidence" defense as to the conflict between what the witnesses said and what the Chrysler manual stated in black and white. Clearly, appellate counsel was ineffective for a failure to preserve the issue by raising on appeal.

Consistent with this Court's decision in *Massaro v United States*, 538 U.S. 500, 509 (2003), the ineffectiveness of counsel is something that is rarely appropriate on direct appeal and, hence, Petitioner was correct to raise the issue of ineffectiveness of appellate counsel for the first time on collateral

attack. Whether or not Judge Cebull had denied that ground earlier is irrelevant to the inquiry.

Instead of focusing on the fact that Petitioner was justified in requiring the Thrifty customer to pay when he or she returned a car with a damaged windshield, whether or not the repair was done immediately—how much leverage would Petitioner have had to get the customer to pay later when the damage was repaired?—Judge Cebull drew attention to his belief that "immediate" payment was evidence of petitioner's intent to defraud his customers. (Appendix Page "B-3") Due to this bias caused by his own misperception, Judge Cebull could not see how the clear misrepresentation of what Chrysler required in its written policy by witnesses Schamm and Hambrect prejudiced Petitioner.

Petitioner's attorney, Mark D. Parker, wrote a letter to the new U.S. Attorney in Montana, whom Judge Cebull recused because he knew the case against Petitioner was fraudulently prosecuted. He ascribes the guilty verdict to suborned perjury. (See Appendix Page "D")

At the very least, the facts demonstrate a genuine fact at issue which was material to Petitioner's guilt or innocence. An evidentiary hearing was justified and a COA was appropriate from both the lower courts, but was denied without comment.

Knowing perjured testimony without correction by the prosecutor is a clear violation of Petitioner's

Fifth Amendment rights. When there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *Strickland*, 466 U.S. at 688), it behooves the courts to examine the claims in detail and appellate co-counsel failed to preserve this issue and it could not be raised in this Court during Petitioner's first petition for a writ of certiorari, and to examine the facts in an evidentiary hearing. Jurists of reason are countless Jurists of reason who would find the way Judge Cebull decided this issue debatable. A COA ought to have issued, but did not.

D. The ineffectiveness of counsel, whether due to a conflict which altered the course of his representation, or due to serious errors which prejudiced Petitioner and for which the "reasonable probability that, but for counsel's serious errors, the result of the proceeding would have been different," existed, in both cases, the errors/conflict is a serious violation of Petitioner's Sixth Amendment rights.

In order to obtain a COA, the petitioner needs to make a "substantial showing of the denial of a constitutional right." (28 U.S.C. § 2253(c)(2)) Unquestionably such a showing has been made and was made in the lower courts.

In *Miller-El v Cockrell*, 537 U.S. 322, 327 (2003), this Court said that "[a"] petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists of reason

could conclude the issues presented are adequate to deserve encouragement to proceed further."

As to each issue Petitioner seeks to have certified for appellate review, he will cite caselaw from jurists of reason who have, in like situations, granted relief. Each issue presents a substantial showing of the denial of either Fifth or Sixth Amendment protections, in some cases both Amendments.

If the standard for adjudicating a claim of an "actual conflict" which resulted in an "adverse[] effect," (*Edwards v Arizona*, 451 U.S. 477, 482 (1982)) is pursuant to *Sullivan*, then jurists of reason cannot but find Judge Cebull's decision debatable. Petitioner's § 2255 attorney, Levitt, spoke with Parker and Parker admitted that it was due to his "divided loyalties" that he rendered what he admitted was "ineffective assistance." In *Holloway v Arkansas*, 435 U.S. 475, 490 (1978), this Court said that the "question is what the advocate found himself compelled to refrain from doing." What trial counsel felt he was refrained from doing was to call any witness who might implicate Dolly Ryan, who he still represented, though not a defendant in the instant case. Among the thirteen witnesses ready and prepped by Petitioner to testify were several who knew enough about the business and Petitioner's involvement in it that it foreclosed any suggestion that he was guilty of using this alleged fraud scheme to his advantage or even that he was aware of it until the charges were brought. By declining to call these witnesses, Parker took an

"adverse action" by deciding not to call any witnesses, even though those 13 witnesses had agreed to testify and some of whom were already waiting to be called.

If the standard was pursuant to *Strickland*, then prejudice is determined by examining the testimony these witnesses were prepared to offer and seeing whether there "is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Id.*, 466 U.S. at 694)

In *Chambers v Mississippi*, 410 U.S. 284 (1984) this Court said that "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense." In *Crane v Kentucky*, 476 U.S. 683, 690 (1986), this court said that "the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense."

Petitioner had a right to have his witnesses called. Parker did not ask Petitioner if he wanted to waive that right before he announced to the court that he was resting. This type of Sixth Amendment error could be harmless if the prospective witnesses could offer no facts which would exonerate Petitioner.

The district court denied the § 2255 ground of failure to call witnesses. (Appendix Page "B-7" through "B-10") It did so on the sole ground that the decision of that court as to an in limine motion to ex-

clude prior conviction was subject to presenting no character witnesses.

Among the 13 witnesses, indeed, were six *potential* character witnesses. Yet, there were also seven whose testimony disproved intent to defraud, which is an essential element of fraud under 18 U.S.C. §§ 1341 and 1343. But of even more significance is the fact that Parker knew nothing of the prospective testimony as, contrary to Petitioner's request, he had done no investigation and had not spoken to these witnesses.

The other substantial showing of the denial of a constitutional right pertains to the prosecutor's knowing use of perjured testimony for two witnesses, one from Chrysler, the other from Thrifty. Petitioner is guaranteed a due process right under the Fifth and Fourteenth Amendments to a fair trial. Both witnesses testified that Chrysler did not have a policy during the period in question of requiring windshields to be replaced, even with minor damage. Their support was in an alleged change to the manual, which they said they forgot to bring with them. The prosecutor asked to have it faxed in and when it came, he found that it was the identical one Petitioner had and it did require replacement So, the prosecutor did not present it as an exhibit and Judge Cebull allowed the testimony to be heard by the jury on the ground that they were experts and could testify as to their knowledge.

That suborned perjury contaminated the entire

trial. If, in fact, Chrysler *did not* require windshields to be replaced, then the practice of Thrifty to require reimbursement of costs for replacement would strongly suggest that Petitioner (or whoever conspired to so represent) was guilty. If Chrysler *did* require damaged windshields to be replaced, there is a substantial probability of an entirely different verdict.

By withholding the faxed manual which proved his witnesses were lying, the prosecutor committed prosecutorial misconduct. This Court discussed such conduct in *United States v Bagley*, 473 U.S. 667, 680 (1985):

> "Although this rule is stated in terms that treat the knowing use of perjured testimony as error subject to harmless-error review, it may as easily be stated as a materiality standard under which the fact that testimony is perjured is considered material unless failure to disclose it would be harmless beyond a reasonable doubt. This Court in *Agurs* justified this standard of materiality on the ground that the knowing use of perjured testimony involves prosecutorial misconduct and, more importantly, involves 'a corruption of the truth-seeking function of the trial process.' *Id.*, at 104...

The point is evident: If the perjured testimony is "material" as to guilt or innocence, and the prosecutor not only persuades the court and jury to rely upon it, and it is likely that absent the perjured

testimony the result of the proceeding would have been different, then the error is not harmless, rather a violation of the Fifth and Fourteenth Amendments.

The point of all of this is that unquestionably the errors, *if* the conflict of counsel caused him to alter his course of defending Petitioner, and which prejudiced him under the *Sullivan* and *Strickland* tests, and *if* the prosecutor's use of suborned perjury violated Petitioner's fundamental rights under the Constitution, then he has made a "substantial showing of the denial of a constitutional right." (28 U.S.C. § 2253)

At the very least, to develop these facts, an evidentiary hearing should have been convened. A COA on the grounds set forth below ought to have been granted, but was not. Was it because the lower courts were so busy that they didn't have the time to adequately determine the issues and the grounds for issuance of a COA? Or, was it because Judge Cebull was biased in favor of his good friend, Attorney Mark D. Parker and did not want to see him exposed as ineffective? Or was it because the lower courts didn't know which standard—*Sullivan* or *Strickland*—to apply?

E. The lower courts erred in failing to grant a COA to enable Petitioner to fully develop the issues urging reversal of Judge Cebull's denial of the § 2255.

The issues which Petitioner seeks certified for ap-

pellate review are as follows, together with the opinions of jurists of reason who have decided differently on the same issues:

> **A. Whether Ryan's counsel had an "actual conflict which caused him to alter his course of defending him under the standard set in *Cuyler v Sullivan*, 446 U.S. 335 (1980), caused by "his divided loyalties," and fear of implicating Ryan's wife, and whether under the circumstances of the case, the representation of a non-defendant (Ryan's wife), whose interests were different than Ryan's ought to be subject to the test in *Sullivan*, or subject to the prejudice standard in *Strickland v Washington*, 466 U.S. 668, 687 (1984)?**

(See *Hall v United States*, 371 F.3d 969, 973 (7th Cir. 2004) (district court was ordered to provide an evidentiary hearing to determine whether there was a conflict of interest which adversely affected the adequacy of the defendant's representation, citing both *Sullivan* and *Strickland*: "two ways to assert a claim based on counsel's conflict of interest. One under *Strickland*...or two, the Petitioner may proceed under *Cuyler v Sullivan*"); *United States v Culverhouse*, 507 F.3d 888, 882 (5th Cir. 2007) (remanded to district court for evidentiary hearing if there was an actual conflict of interest in multiple-representation case); and *United States v Infante*, 404 F.3d 376, 393 (5th Cir. 2005) (*Sullivan* applies in cases of successive representation and case remanded to district court to see if there was an actual conflict.)

B. Whether the prosecutor committed misconduct by suborning perjury which had a material effect on the guilt or innocence of Ryan?

(See *Byrd, Jr. v Collins*, 2000 U.S. App. LEXIS 6266, 2000 FED App. 0121P (6th Cir. 2000) at 48-49) ("to establish a claim of prosecutorial misconduct or denial of due process, the defendant must show that the statement in question was false, that the prosecutor knew it was false, and that it was material," all of which Petitioner demonstrated in his § 2255); *Moreno-Morales v United States*, 334 F.3d 140, 148 (1st Cir. 2003) ("Prosecutorial misconduct is only a ground for § 2255 relief if it violates petitioner's due process rights...that is, if the conduct so infected the trial with unfairness as to make the resulting conviction a denial of due process," which Petitioner has amply demonstrated); and *United States v Bagley*, 473 U.S. 667, 680 ("materiality standard [appropriate] [if] perjured testimony involves prosecutorial misconduct and, more importantly involves a corruption of the truth-seeking function of the trial process," which Petitioner amply demonstrated in his § 2255 and which should have justified a COA from the lower courts.)

C. Whether Ryan received ineffective assistance of counsel under the *Strickland's* two-prong standard for both his trial and appeal?

(See *Chambers v Mississippi*, 410 U.S. 284 (1973); *California v Trombetta*, 467 U.S. 479 (1984);

Crane v Kentucky, 476 U.S. 683 (1986) (all confirmed the right to a defense and to examine witnesses, which Petitioner used to demonstrate that he received ineffective assistance of trial counsel; to wit, the prosecution claimed that Chrysler had no policy concerning unwillingness to accept damaged windshields on returns and at least four of the 13 witnesses listed in the § 2255 would have shown this perjured testimony was false); *May v Henderson*, 13 F.3d 528, 533 (2nd Cir. 1994) (if petitioner demonstrated that appellate counsel "omitted significant and obvious issues while pursuing issues that were clearly significantly weaker..."ineffectiveness shown; Petitioner alleged appellate counsel argued a "best evidence" claim in direct appeal and failed to argue prosecutorial misconduct by suborning perjury on the part of two Chrysler/Thrifty employee-witnesses for the government.)

D. Whether Ryan ought to have been granted an evidentiary hearing when material facts were at issue; and whether Judge Cebull's obvious bias toward Parker influenced his decision?

More than ample cases have been cited in the petition to demonstrate that jurists of reason would undoubtedly find the way Judge Cebull resolved the issues was debatable, and a COA certifying this issue ought to have been granted in the lower courts, and/or Judge Cebull ought to have recused himself due to his bias consistent with 28 U.S.C. § 455(a)-(b)(1).

WHEREFORE, Petitioner respectfully prays the Court will resolve the conflict among the circuits on the question as to whether *Sullivan* applies to successive-representation cases as well as multiple-representation cases and grant him a COA on the issues above; and such other and further relief as the Court deems just, lawful and equitable.

By executing this Petition this 30th day of November, 2010, Petitioner declares the statements herein are true on penalty of perjury pursuant to 28 U.S.C. § 1746.

/S/ Michael W. Ryan
Petitioner

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	No. 10-35133
Plaintiff – Appellee,	D.C. Nos. 1:09-cv-00149-RFC 1:06-cr-00073-WFN
v.	District of Montana, Billings
MICHAEL W. RYAN,	ORDER
Defendant – Appellant	

Before: O'SCANNLAIN and HAWKINS, Circuit Judges.

Appellant's request for a certificate of appealabilty is denied. See 28 U.S.C. § 2253(c)(2). All other outstanding motions are denied as moot.

Filed August 31, 2010.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

UNITED STATES OF AMERICA, Plaintiff/Respondent vs. MICHAEL W. RYAN, Defendant/Movant	Cause No. CR 06-073-BLG-RFC CV 09-149-BLG-RFC ORDER DENYING § 2255 MOTION AND DENYING CERTIFICATE OF APPEALABILITY

On November 5, 2009, Defendant/Movant Michael Ryan ("Ryan") filed a motion to vacate, set aside, or correct his sentence, pursuant to 28 U.S.C. § 2255 ("Mot. § 2255"). Ryan is a federal prisoner proceeding with counsel.

I. Preliminary Screening

Pursuant to 28 U.S.C. § 2255(b), the Court must conduct a preliminary review of the motion to determine whether "the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." *See also* Rule 4(b), Rules Governing Section 2255 Proceedings for the United States District Courts.

II. Background

Ryan owned Thrifty car rental franchises in Billings and Belgrade, Montana, Cody and Jackson Hole, Wyoming, and Idaho Falls, Idaho. He leased vehicles from Daimler Chrysler Corporation. At the end of the lease period, the cars were sold at auction. Ryan, his employee Jeffrey Loney, and Kevin Massick of Fas-Break Auto Glass Center in Billings entered into a scheme to fraudulently charge Thrifty customers for windshield replacements. They shared the proceeds. The scheme was carried out in six steps:

1. If a Thrifty customer did not purchase extra insurance coverage for windshield damage, Thrifty employees were urged to find damage to the windshield, however slight,[1] when the vehicle was returned.
2. Thrifty customers and their insurers received letters or faxes purported to be invoices for work already performed by Fas-Break to support charges of around $1000 for replacing the windshield. When Thrifty customers complained about the cost they were told that Chrysler, not Thrifty, required replacement of the windshield.
3. Some Thrifty customers paid the entire invoice cost

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[1] One witness described a replacement-qualifying chip as "a little bigger than a grain of rice...right behind the mirror where you couldn't see it from the interior from either side." Trial Tr. 2 at 317:10-12. Another described the windshield damage as a "sand pit that was maybe, you know, a quarter of the size of the end of my little fingernail," *Id.* At 333:14-15, "below and to the left of my normal line of sight," *id.* At 334:8-9. Another said, "I didn't see any chip." *Id.* 367:10. Another happened to have a ruler and measured the chip on her windshield. It was, at most, 5 millimeters. *Id.* At 378:7-8. Another couldn't see a chip but could feel it with his fingernail. *Id.* At 509:8-11.

themselves. Thrifty billed the credit cards of the other customers for the amount of their insurance policy deductibles, and the insurers sent the remainder of the payment to Fas-Break.

4. Most of the windshields were not replaced, and the vehicles were re-rented, "as is," to other customers. If a windshield was replaced or repaired, the cost was significantly less than was shown on the purported invoice.

5. Ryan and Massick shared the difference between the actual cost of repair or replacement of the windshield, if any, and the proceeds received from Thrifty customers and their insurers.

6. When a vehicle was prepared for auction, the windshield was replaced, if necessary, for around $300.

To be clear, the windshield damage was real, if minimal. The need for repair or replacement before the vehicle was put up for auction was real. The scheme consisted of claiming that replacement was required immediately and cost around $1000 when it was neither required nor performed immediately nor cost anywhere near $1000.[2]

In the pre-indictment investigation of the case, Ryan and his wife Dolly were both represented by counsel Mark Parker. Mot. § 2255 (doc. 281) at 30.

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[2] In at least one instance, multiple customers were billed for multiple windshield replacements on one vehicle, none of which occurred.

On May 22, 2006, Ryan was indicted on one count of conspiracy to commit fraud by use of the mail or wires, a violation of 18 U.S.C. §§ 371, 1341, 1343 (Count 1); fourteen counts of mail fraud, violations of 18 U.S.C. § 1341 (Counts 2, 3, 5, 6, and 8-17); and two counts of wire fraud, violations of 18 U.S.C. § 1343 (Counts 4, and 7). Dolly Ryan was not indicted. Indictment (doc. 1) at 20. Ryan retained Mark Parker to represent him.

On August 1, 2006, the United States charged Kevin Massey, owner of Fas-Break, and Jeffrey Loney, a Thrifty employee, by separate Informations. Each was charged with conspiracy to commit mail and wire fraud, the same conspiracy charged against Ryan in Count 1 of the Indictment. Fully executed plea agreements were filed the same day. Massey and Loney pled guilty on August 11, 2006. Information (docs. 31, 33); Plea Agreements (docs. 32, 34); Minutes (docs. 44, 45).

Trial commenced on December 4, 2006. After five days of trial, the jury heard closing arguments on December 11, 2006. It deliberated for about four hours before returning a guilty verdict on all counts.

Ryan filed two motions for judgment of acquittal and one

for a new trial. One of his principal arguments concerned a discrepancy between Chrysler's written policy at the time of the indictment, requiring replacement of all damaged windshields, and the testimony of Hambrecht and Schemm, who both asserted that some damage was permissible in practice. Ryan's motions were denied.

On August 15, 2007, Ryan was sentenced to serve 71 months in prison, to be followed by a three-year term of supervised release. Restitution and a fine were also imposed. Minutes (doc. 251); Judgment (doc. 253) at 3-4, 10.

Ryan appealed, represented by Parker and new co-counsel James Goetz. On June 19, 2008, Ryan's convictions and sentence were affirmed. *United States v Ryan*, No. 07-30319 (9th Cir. June 19, 2008)(unpublished mem. disp.). He filed a petition for writ of certiorari. It was denied on November 17, 2008. *Ryan v United States*, __U.S.__, 129 S. Ct. 609 (2008).

Ryan timely filed his § 2255 motion in this Court on November 5, 2009. 28 U.S.C. §2255(f)(1).

III. Ryan's Allegations

Ryan asserts that Parker provided ineffective assistance

because he failed to call thirteen witnesses[3] and because he had a conflict of interest. He claims Goetz was ineffective because he failed to raise perjury by prosecution witnesses or Parker's conflict of interest on direct appeal. Finally, Ryan claims that the prosecution suborned perjury.

IV. Analysis

A. Ineffective Assistance of Counsel

Strickland v. Washington, 466 U.S. 668 (1984), sets the standards with respect to claims alleging ineffective assistance of counsel. First, Ryan must show that counsel's performance fell below an objective standard of reasonableness. *Id.* at 687-88. Second, he must show that he was prejudiced by counsel's errors. *Id.* at 693. Under the first prong, counsel's performance need not be perfect. It must, however, fall "within the range of competence demanded of attorneys in criminal cases." *McMann v. Richardson*, 397 U.S. 759, 771 (1970). Under the prejudice prong, Ryan must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would

[3] Ryan speculates that Parker must have personally performed any pretrial investigation, "which would have created difficulty had a witness changed his testimony from earlier interviews." Mot. § 2255 (doc. 281) at 16. The Court is 100% certain that Parker knows what he is doing when he interviews witnesses in preparation for a criminal trial.

have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* "[T]here is no reason for a court deciding an ineffective assistance claim…even to address both components of the inquiry if the defendant makes an insufficient showing on one." *Id.* at 697.

1. Failure to Call Witnesses

Ryan says Parker should have called witnesses to testify about various matters.

(a) Character and Lack of Wrongful Intent. Ryan was convicted in 1990 of possession of cocaine with intent to distribute it. The vehicle for Ryan's trafficking was his Thrifty car rental franchise. Parker filed a motion in limine to exclude any evidence of the conviction. It was denied. "[E]vidence of Defendant's prior conviction could be admissible for a limited purpose in limited circumstances," Order Denying Def. Mot. To Exclude (doc. 62) at 3 (under seal), for instance, if Ryan put his character at issue or if a witness were to testify that Ryan "has always been scrupulously law-abiding and would never use his business as a front for criminal activity," *Id.* at 2. Parker's failure to call witnesses to testify to Ryan's good character or his lack

of intent to commit a crime was more than reasonable. Ryan's claims that Parker should have called witnesses Kerrylyn Miller, Debbit Witt, Terry Sheets, David Phillips, Mark Michaelson, and Carol Brown, Mot. § 2255 at 18-20, are denied.

(b) Chrysler Policy re: Replacement of Damaged Windshields. Ryan and his co-conspirators told Thrifty customers the windshield had to be replaced immediately and that it would cost around $1000, knowing, all the while, that the windshields would not be replaced until the vehicle was prepared for auction, at which time the windshield would be replaced or repaired, if necessary, for around $300. Whether Chrysler would occasionally allow a vehicle to be sold with slight damage or repair rather than windshield replacement was a minor issue in the prosecution's theory of the case. The point was that Ryan and his co-conspirators charged Thrifty customers for work that was not done when, why, how, and at the price they said it was. Ryan does not suggest that witnesses Alana Coronato, Frank Kroll, Bruce Knudsen, Larry Griffin, or Jamie Alexander, Mot. § 2255 at 18-19, could have provided testimony to negate the prosecution's theory of the case. Ryan's claims that Parker should have called them are denied.

(c) Jeff Loney's Credibility. Ryan identifies three witnesses who would have testified that Loney lacked credibility and could not be trusted. Loney's admission that he committed a criminal fraud probably established those points as well as the opinion testimony of third parties could have. In addition, his testimony was corroborated by other witnesses and documentary evidence; his credibility was not the key to Ryan's conviction. Finally, Parker's strategy was to persuade the jury that the scheme might have been sharp business practice, but it was not unlawful or an intentional fraud. Emphasizing Loney's character could have undermined that strategy, given Ryan's relationship with him. At the same time, it would not have negated the evidence showing that Ryan was profiting from Fas-Break's work. Ryan does not claim that Parker's strategy was unreasonable—on the contrary, he continues to insist on it. *E.g.*, Mot. § 2255 at 21 ("Thrifty operated a zero tolerance policy regarding any damage to the automobile's windshields consistent with Chrysler's policy."). Nor has he shown a reasonable probability that presentation of two or three witnesses denigrating Loney's truthfulness would have resulted in an acquittal. Ryan claims that Parker should have

called Kroll, Keith Christman, and Lindsay Ryan[4] are denied.

(d) Unprofitability of Replacing Undamaged Windshields. Ryan asserts that he "has steadfastly maintained his innocence in that it would be unprofitable for him to replace undamaged windshields consistent with the testimony that would have been provided by Bruce Knudsen." Mot. § 2255 at 20; *see also id.* at 22-23. This argument ignores Step 4 of the scheme as set forth above. Ryan received monetary benefit from *not* replacing windshields. Parker's decision not to call a witness who would have established that Thrifty could not afford to do what it told customers it was doing was not only reasonable but necessary. This claim is denied.

2. Appellate Argument re: Best Evidence Rule

Ryan contends that appellate counsel Goetz was ineffective because he failed to argue before the Ninth Circuit Court of Appeals that the United States suborned perjury. Claims of ineffective assistance of appellate counsel are governed by the *Strickland* standards. *Smith v. Robbins*,

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[4] Ryan says Lindsay Ryan "was employed by the Movant and provided all damage reports to Loney who was in charge of damages and repairs. She also would have served as a character witness for the Movant." Mot. § 2255 at 20. It is not clear what that means she would have said about Loney or damage reports, if anything. If she had important testimony, no doubt Ryan would have said what it was.

528 U.S. 259, 285 (2000). At the circuit, Goetz argued the best-evidence rule, Fed. R. Evid. 1002, i.e., that the jury should have been given the written policy, which stated that damaged or repaired windshields were unacceptable, rather than the testimony of Hambrecht and Schemm. If the written policy was not the best evidence of the policy, there was no evidence to support the perjury claim. In the petition for writ of certiorari, Ryan says, Goetz reframed the claim as a subornation of perjury claim, relying on the written policy to establish the truth and implicating the testimony as false.

This claim is denied. First, there is frequently a discrepancy between written policy and actual practice. That does not make liars of either the practitioners or the policy-writers. Second, and more importantly, no one but Ryan and his co-conspirators ever claimed that Chrysler required *immediate*, on-the-Thrifty-lot replacement of damaged windshields. And that claim was refuted not by the written policy and not by Hambrecht and Schemm, but by the fact that Ryan and his co-conspirators did not immediately replace the windshields. *E.g.*, Trial Tr. 2 at 420:23-451:5 (Jackson). They waited until the vehicle was prepared for auction. This claim is denied.

3. Appellate Argument re: Conflict of Interest

Ryan also asserts that Goetz could have obtained reversal by asserting Parker's conflict of interest. Issues outside the record cannot be fairly presented on appeal, and appellate counsel cannot be ineffective for failing to include them. *Cf. Massaro v. United States*, 538 U.S. 500, 509 (2003) ("[F]ailure to raise an ineffective assistance of counsel claim on direct appeal does not bar the claim from being brought in a later, appropriate proceeding under § 2255."). This claim is denied.

4. Parker's Conflict of Interest

Ryan contends that he was prejudiced at trial by the fact that his wife was also a client of Parker's He asserts that "counsel was...facing divided loyalties by not presenting a defense which could have included the testimony of Dolly Ryan. Dolly Ryan's testimony may have swayed the jury to find that she, and not the Movant, was responsible for any allegations of fraud." Mot. § 2255 at 34. He also asserts, "upon information and beliefs as well as a recent telephone conversation with former counsel Parker, Mr. Parker admitted to undersigned counsel that he was ineffective in this case as a result of his divided loyalties." *Id.* at 33.

It is true, as a hypothetical matter, that an attorney other

than Parker could have called Dolly Ryan as a defense witness in order to inculpate her. It is also true that Ryan does not have to show a reasonable probability that he would have been *acquitted* if only Dolly Ryan had been called as a witness. But Ryan does have to show that Parker's conflict of interest "actually affected the adequacy of [Ryan's] representation." *Mickens v.Taylor,* 535 U.S. 162, 168 (2002) (describing the holding of *Cuyler v. Sullivan*, 446 U.S. 335 (1980)).

If there was some indication in Ryan's motion or in the record of the case that Dolly Ryan was involved in the scheme in some way that *contradicted* or even *mitigated* Ryan's own involvement, then this allegation would warrant further proceedings. While there is evidence that Dolly might have been involved, there is no indication that her involvement somehow contradicted or mitigated Ryan's *E.g.*, Trial Tr. 2 at 407:23-408:4, 410:1-15 (Roscoe); Trial Tr. 3 at 688:20-689:18 (Massick); *id.* at 764:1-766:9 (Loney). Ryan's mere assertion of the conflict of interest alleges nothing that is "more than a sheer possibility" of error. *Ashcroft v Iqbal*, __ U.S. __, __, 129 S. Ct. 1937, 1949 (2009). It does not warrant an evidentiary hearing because, even if all the factual assertions in Ryan's motion are true, they are not sufficient to

support relief. *United States v. McMullen*, 98 F.3d 1155, 1159 (9th Cir. 1996) (citing *Baumann v. United States*, 692 F.2d 565, 571 (9th Cir. 1982)). This claim is denied.

B Subornation of Perjury

This Court has already decided this issue. Order Denying Def. Post-Trial Mots. (doc. 207) at 2-6. Ryan presents no reason to depart from the law of the case. *United States v. Alexander*, 106 F.3d 874, 876 (9th Cir. 1997). This claim is denied.

V. Certificate of Appealability

"The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Rule 11(a), Rules Governing § 2255 Proceedings.

A Governing Law

"A Certificate of appealability may issue...only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c); *Hohn v. United States*, 524 U.S. 236 (1998); *Lambright v Stewart*, 220 F.3d 1022, 1024 (9th Cir. 2000). To obtain a certificate, Ryan must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or

wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Any doubt as to whether a petitioner has met the standard is resolved in his favor. *Lambright*, 220 F.3d at 1025.

B. Discussion

Ryan has not made a showing with substance to it that he was deprived of a constitutional right. He continues to insist that he did not do what he was neither accused nor convicted of doing.

As to what he was convicted of doing—charging Thrifty customers for work that was not done when, why, how, and at the price Thrifty and Fas-Break said it was—Ryan identifies no witness testimony that, to a reasonable probability, could have made a difference in the jury's verdict. While he does identify a conflict of interest that Parker had as attorney for both Ryan and his unindicted wife, he offers no reason to believe that calling Dolly Ryan as a witness, as he suggests, might have negated Ryan's guilt. Consequently, he has nothing to support an inference that Parker's erstwhile dual representation actually affected the adequacy of his performance at Ryan's trial. And, of course, appellate counsel was not obligated to present the conflict of interest issue on appeal because it lacked a factual basis in

the trial record.

Finally, Ryan's claim that the prosecution suborned perjury is built on an unremarkable contradiction between written policy and actual practice as testified to by two witnesses. This Court concluded in the original proceedings that there was no perjury, and Ryan offers no reason to revisit that conclusion. Appellate counsel's manner of presenting the issue under the best-evidence rule in the appellate court was not unreasonable, because his only means of establishing the falsity of the witnesses' testimony was to compel a conclusion that the written policy was true.

There is no reason to encourage further proceedings. A certificate of appealability is not warranted.

Accordingly, IT IS HEREBY ORDERED as follows:

1. Ryan's motion to vacate, set aside, or correct the sentence under 28 U.S.C. § 2255 (doc. 281) is DENIED;

2. A certificate of appealability is DENIED. The Clerk of Court shall immediately process the appeal if Ryan files a Notice of Appeal;

3. The Clerk of Court shall ensure that all pending motions in this case and in CV 09-149-BLG-RFC are

terminated and shall close the civil file by entering judgment in favor of the United States and against Ryan.

DATED this 5th day of February, 2010.

/S/ Richard F. Cebull, Chief Judge
United States District Court

Appendix Page "C"

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	No. 10-35133
Plaintiff – Appellee,	D.C. Nos. 1:09-cv-00149-RFC 1:06-cr-00073-WFN
v.	District of Montana, Billings
MICHAEL W. RYAN,	ORDER
Defendant – Appellant	

Before: HAWKINS and CLIFTON, Circuit Judges.

Appellant's motion for reconsideration is denied. *See* 9th Cir. R. 27-10.

No further filings will be accepted in this closed case.

Filed September 27, 2010.

Parker, Heitz & Cosgrove, PLLC ATTORNEYS AT LAW

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November 2, 2010

Michael W. Cotter
U.S. Attorney District of Montana
901 Front St., Rm. 1100
Helena, MT 59626

Re: U.S. v. Michael Ryan

Dear Mike:

I see the Judge has sent us a letter that Mike Ryan sent to the Judge.

Ryan is in jail because the U.S. Attorney's Office, regrettably, solicited false testimony about a non-existent document from a government witness, then went on to put on purely fabricated testimony that the document was sent to Mr. Ryan when, in fact, (a) the document never existed, and (b) as it never existed, it could not have been sent to Ryan. I can assure you, if he would have been in front of Judge Mike Cotter, Mike Ryan would not be in jail.

Very truly yours,

Mark D. Parker

MDP/drs
cc: Mike Ryan

Case No. 10-_____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 2010

MICHAEL W. RYAN,

Petitioner,

v

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS OR THE NINTH CIRCUIT

CERTIFICATE OF COMPLIANCE

This is to certify that this Petition complies with the requirements set forth in Supreme Court Rule 33 and that the total words in the numbered pages (exclusive of the Appendix) is 6175.

/S/ Michael W. Ryan
Michael W. Ryan, Pro Se
#20920-046
Federal Prison Camp
P0B 5000
Florence, CO 81226-5000

Case No. 10-_____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 2010

MICHAEL W. RYAN,

Petitioner,

v

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS OR THE NINTH CIRCUIT

CERTIFICATE OF SERVICE

This is to certify that 2 true copies of the Petition for Certiorari in this case were served upon the United States Solicitor, Department of Justice, Room 5614, Washington DC 20530, and that no other party is interested in this case, service being done by First Class mail, with postage prepaid, this 30th day of November, 2010.

/S/ Michael W. Ryan

Michael W. Ryan, Pro Se
#20920-046
Federal Prison Camp
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Florence, CO 81226-5000